Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Implementation of Infrastructure	)	CC Docket No. 96-237
Sharing Provisions in the	)	
Telecommunications Act of 1996	)	

PETITION FOR RECONSIDERATION AND CLARIFICATION
OF
SOUTHWESTERN BELL TELEPHONE COMPANY

Southwestern Bell Telephone Company ("SWBT") files this Petition for Reconsideration and Clarification with respect to the Report and Order ("Order"), FCC 97-36, issued in this proceeding on February 8, 1997. SWBT applauds the Commission's recognition of the validity of intellectual property ("IP") rights, and that Section 259 does not override those rights. However, the Commission should eliminate the requirement that incumbent local exchange carriers ("LECs") be responsible for securing IP licenses for requesting carriers, and instead require qualifying carriers to obtain any necessary licenses for themselves. The Commission should also reconsider its requirement to provide resale under Section 259. Finally, the Commission should clarify that its Order does not require incumbent LECs to provide access to intellectual property by sharing where a sufficient IP license has not been obtained.

The Order Appropriately Recognizes Intellectual Property Rights

In paragraph 69 of the Order, the Commission has appropriately recognized two fundamental premises: (i) when infrastructure sharing implicates intellectual property rights such that no existing license permits the sharing, a license will need to be obtained from the IP's holder; and (ii) the qualifying carrier is ultimately responsible for the charges associated with the IP

licensing and the IP's use. SWBT firmly believes that rights associated with IP must be respected, and that neither the Act in general nor Section 259 in particular permit the ownership rights of IP holders to be ignored.

Beyond the Order, the Commission has recently requested comment on the "Petition of MCI for Declaratory Ruling" filed by MCI Telecommunications Corp. ("MCI"). See Public Notice, CC Docket No. 96-98, CCBPol 97-4, DA 97-557 (March 14, 1997). Inasmuch as positions taken by SWBT appear to have engendered MCI's Petition, SWBT looks forward to providing more factual information and legal analysis pertaining to intellectual property rights in that proceeding.

Qualifying Carriers Should Be Required to Secure Any Necessary Licenses on Their Own Behalf

Notwithstanding the fact that the ultimate responsibility for any IP license rests with the qualifying carrier, the Commission is requiring incumbent LECs to negotiate on behalf of qualifying carriers for those licenses. Order, para. 70. The Commission should reconsider, and instead require qualifying carriers to negotiate for themselves. Otherwise, incumbent LECs are forced into an unreasonable and inappropriate position from both practical and legal perspectives.

Having incumbent LECs negotiate for qualifying carriers is an awkward, inefficient, and unreasonable structure at best. Only the qualifying carrier can know the precise nature of how the necessary IP will or may be put to use, where the IP may be used, and thus what type of license it requires to accommodate its needs. For example, some of SWBT's IP licenses restrict the IP's use to the five-State region in which SWBT operates. Such terms and conditions have been acceptable to SWBT due to the scope of its operations. Given that there are no express

geographic limitations on infrastructure sharing, SWBT could be obligated to share infrastructure with qualifying carriers for use outside of that region, thus necessitating a new IP license sufficient for that use. Only the qualifying carrier will know what geographic scope it needs, and whether it wants a broader scope to accommodate its plans. The scope of the license will likely have a corresponding effect on associated right-to-use fees.

An incumbent LEC is simply in no position to know how much flexibility any particular qualifying carrier needs, how much it is willing to pay for that flexibility, what tradeoffs it would be willing to accept, or any other of the innumerable issues or details that might arise during negotiations that a qualifying carrier might find important or relevant to its decision-making process. Only the qualifying carrier can make those and the other decisions that will have to be made during negotiations so that an acceptable IP licensing agreement is ultimately reached.

In a similar vein, there is no reason to believe that qualifying carriers will consider incumbent LECs to be satisfactory negotiators, or will want incumbent LECs to do the negotiating. Obviously, the qualifying carrier will bear the sole burden of the terms and conditions, including fees, of any license negotiated by the incumbent LEC for a qualifying carrier. SWBT has already been faced with accusations that it has no economic incentive to negotiate favorable terms and conditions, including price, when another carrier bears the burden of the deal struck by SWBT. See, e.g., March 5, 1997, letter from Metro Access Networks, Inc. to the Department of Justice, pertaining to physical collocation charges. In fact, the Commission has elsewhere concluded that passing-on costs eliminates a LEC's incentive to negotiate prices.[1] The

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[1] *Expanded Interconnection with Local Telephone Company Facilities*, CC Docket No. 91-141, Memorandum Opinion and Order, 9 FCC Rcd 5154, para. 124 (1994).

adoption of a sharing structure that places incumbent LECs in that same position and subject to those same criticisms is unreasonable, especially since there is nothing that prevents the qualifying carrier from directly negotiating its own license with the vendor.

The Commission cannot assume that incumbent LECs are better equipped or qualified to negotiate IP licenses on behalf of qualifying carriers, especially since qualifying carriers can be incumbent LECs. Inasmuch as no "eligible telecommunications carrier" is categorically excluded from being a qualifying carrier, regardless of its size or affiliation, the incumbent LEC will not necessarily be larger (e.g., more access lines, more revenue), have idle resources (e.g., personnel, time) that can be used to negotiate for the sole benefit of the private third party,[2] have more expertise in negotiating IP licenses, or have greater bargaining power. Incumbent LECs could, for example, be required to negotiate for AT&T, MCI, Sprint, or other multi-national carriers. Indeed, every facilities-based telecommunications carrier must negotiate IP licenses with vendors and do so on a regular basis since no carrier can operate without such licenses.[3] The Order wholly fails to explain why every incumbent LEC is always in a better position than any qualifying carrier to negotiate an appropriate IP license for the sole benefit of that qualifying carrier.

The Order also forces an incumbent LEC into a murky legal relationship with a requesting carrier. The incumbent LEC is clearly not an agent of the qualifying carrier. Agency relationships

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[2] Just as qualifying carriers are responsible for the license fees for use of the IP, qualifying carriers will be responsible for any out-of-pocket expenses incurred in the negotiations as well as reasonable charges for the time spent by incumbent LEC personnel in securing licenses.

[3] Qualifying carriers must be at least partially facilities-based. See 47 U.S.C. Sections 259(d)(2); 214(e)(1)(A).

are created by the mutual consent of both parties.[4] Although incumbent LECs would not be in a fiduciary relationship with qualifying carriers, the exact legal nature of that relationship and the extent of an incumbent LEC's authority to negotiate on behalf of a qualifying carrier is far from clear. Quite simply, this structure is an invitation to frustration, dispute, and litigation.

Incumbent LECs should also not be placed in the middle of a relationship between an IP holder and a qualifying carrier. Even if an incumbent LEC could successfully, efficiently, and promptly negotiate an acceptable IP license, the qualifying carrier will in all likelihood still need to sign the license agreement, both for its own reasons and due to the IP holder's requirements. Qualifying carriers will want privity with those holders in order to be able to directly claim the benefits of warranties, indemnities, limitations, and other terms. From the IP holder's perspective, it will undoubtedly seek to bind that carrier directly given that the carrier will be the ultimate beneficiary and ultimately responsible for compliance with the license. From an incumbent LEC's perspective, it will likely not want to sign any license that is for the sole benefit of the qualifying carrier. Being party to such a license would likely expose the incumbent LEC to liabilities and obligations based upon the independent actions of the qualifying carrier. There is nothing in the Act, including Section 259, that can be interpreted as requiring incumbent LECs to act as "guarantors" of qualifying carriers.

Moreover, the Commission failed to provide the source of its authority for requiring an incumbent LEC to act on behalf of a third party carrier for that carrier's exclusive benefit. SWBT

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[4] See, e.g., Restatement of the Law, 2d, Agency, Section 1(1):

> Agency is the fiduciary relationship which results from the manifestation of consent by one person to another that the other shall act on his behalf and subject to his control, and consent by the other to so act.

acknowledges its obligation to share infrastructure in accordance with and pursuant to Section 259. However, it does not follow from Section 259 that incumbent LECs can be forced to "share" what they do not possess; namely, IP that qualifying carriers can practice or use. The term "sharing" connotes that the incumbent LEC has an ability to allow another carrier to use the sought-after infrastructure. If an incumbent LEC does not have the legal right to allow another carrier to use the requested IP, there is literally nothing to share due to the limited bundle of rights possessed by the incumbent LEC. Before sharing is possible, additional rights must be acquired and added to the existing bundle. Elsewhere, the Commission determined that it is economically unreasonable to require incumbent LECs to acquire infrastructure on the basis of a request from a qualifying carrier where the incumbent LEC has not otherwise acquired such infrastructure on its own behalf. Order, para. 96. Here, the Commission is inconsistently requiring an incumbent LEC to acquire IP that by definition it does not need, and never will. SWBT is unaware of any Commission authority to require incumbent LECs to obtain rights it does not need for its own, or to act as a negotiator for third parties.

Due to all of the practical and legal issues raised by having incumbent LECs negotiate for qualifying carriers, the Commission should reconsider the requirement that incumbent LECs be responsible for securing any necessary IP licenses on behalf of qualifying carriers. Qualifying carriers should be required to act on their own behalf where necessary, as they already do.

SWBT is not suggesting that incumbent LECs have no role in helping qualifying carriers to secure IP licenses. Subject to any non-disclosure obligations to IP holders, incumbent LECs are in the best position to identify what IP would be implicated by an infrastructure sharing request, and to help clarify whether and how the existing license permits the IP to be shared. For

example, with respect to unbundled network elements, SWBT is identifying the various IP licenses that it has, associating those licenses with particular network elements, and evaluating whether use of a network element might require that the requesting carrier obtain a license. By providing that information, SWBT assists the carrier requesting a network element in securing a license from the IP holder. This process was suggested by SWBT in State arbitrations, and has been adopted by the Public Utility Commission of Texas. A similar process could be used by incumbent LECs when a request for infrastructure sharing is made.

Resale Should Not Be Available under Section 259

The Commission should reconsider its conclusion that qualifying carriers should be able to resell an incumbent LEC's telecommunications services under Section 259. Order, para. 54. SWBT does not contest that a qualifying carrier can request resale from an incumbent LEC under Section 251(c)(4). Section 259(a) does not, however, encompass resale.

By its terms, an incumbent LEC is only required to make available "such network infrastructure, technology, information, and telecommunications facilities and functions . . . for the purpose of enabling such qualifying carrier to provide telecommunications services, or to provide access to information services." Section 259(a). In that litany of what is to be made available, Congress conspicuously omitted "telecommunications services" even though the phrase appeared later in the same sentence. If Congress had contemplated a wholesale avenue other than Section 251 to obtain "telecommunications services," it clearly would have included that phrase among the list of what is eligible for "sharing." The use of multiple descriptive words to list what is eligible for sharing indicates the exclusion of all others, especially where the one sought to be added by interpretation (e.g., telecommunications services) is different in kind from those

expressly set forth (e.g., items that are less than a service). Entitling Section 259 "Infrastructure Sharing" clearly indicates that the provision of something less than a telecommunications service is encompassed with this Section. Further, that which is made available under Section 259 enables the qualifying carrier to provide a service; under the Commission's interpretation, an incumbent LEC is required to make available a telecommunications service to enable the qualifying carrier to provide a telecommunications service. Such an interpretation renders the language of Section 259(a) partially circular and redundant, and is unreasonable. The Commission's interpretation would also unlawfully avoid the wholesale pricing standard of Section 252(d)(3), and the State commissions' jurisdiction over those determinations. The Commission should accordingly reconsider and eliminate any resale obligation under Section 259(a).

The Commission Should Clarify its Order to Avoid Placing Incumbent LECs in a Position of Having to Violate IP Rights or the FCC's Rules

The Commission should also clarify that incumbent LECs are not required to share infrastructure until any necessary IP license has been secured. SWBT is concerned that some parties may read language in paragraph 70 of the Order as requiring sharing even in the absence of a sufficient IP license.[5] SWBT can foresee possible situations where the IP holder is seeking a license that the qualifying carrier believes is unreasonable. Such a qualifying carrier may attempt to rely on paragraph 70, and demand that the incumbent LEC provide access to the holder's IP notwithstanding the lack of a sufficient license. An incumbent LEC cannot be held responsible for

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[5] Order, para. 70 ("we agree with AT&T and RTC that providing incumbent LECs may not evade their section 259 obligations merely because their arrangements with third party providers of information and other types of intellectual property do not contemplate -- or allow -- provision of certain types of information to qualifying carriers.").

the acts of independent third parties (IP holders), and should not be placed in a position of violating either its IP licenses and the IP rights of others, or the Order. Not only would requiring incumbent LECs to provide access to IP in those circumstances be inconsistent with the Commission's recognition of IP rights, such a requirement would be inconsistent with and contrary to Section 259 and the federal and State laws respecting IP. There is absolutely nothing in the Act, Section 259, or otherwise that authorizes the Commission or incumbent LECs to ignore the IP rights of others, that authorizes the impairment of contracts between incumbent LECs and IP holders, or that authorizes the taking of IP, with or without just compensation. The Commission should clarify paragraph 70 and the Order accordingly. To the extent that paragraph 70 was intended to place incumbent LECs in such an untenable position, SWBT respectfully asks the Commission to reconsider that requirement.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Liz Jensen, hereby certify that the foregoing, Petition for Reconsideration and Clarification of Southwestern Bell Telephone Company, in Docket No. 96-237, has been served this 3rd day of April, 1997 to the Parties of Record.

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